



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUNGOMA

(CORAM: CHERERE-J)

CRIMINAL APPEAL NO. 122 OF 2018

BETWEEN

ALFRED MUSILA WAFULA.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(An appeal from the conviction and sentence in SO Criminal Case Number 52 OF 2018 in the Senior Principal Magistrate's Court at Sirisia by Hon. L.N.Kiniale (SRM) on 09.10.18)

JUDGMENT

The Trial

1. On 08th October, 2018, the Appellant herein **ALFRED MUSILA WAFULA** pleaded guilty to a charge of defilement contrary to section 8(1) as read with section 8(2) of the Sexual Offences Act No. 3 of 2006 (hereinafter referred to as **the Act**) and was sentenced to serve life imprisonment.

The Appeal

2. Aggrieved by this decision, the appellant lodged the instant appeal on 09.10.18. From the 4 grounds of appeal Appellant raises one ground that the sentence is harsh.

3. When the appeal came up for hearing on 07.08.19, the Appellant chose to wholly rely on the grounds of appeal and written submission filed on 24th July, 2019.

4. Mr. Akello, Learned Counsel for the state stated that sentence is at the discretion of the trial court.

Analysis and determination

5. The appellant is appealing only on sentence. The Court of Appeal in **Ahmad Abolfathi Mohammed & Another –vs- Republic Criminal Appeal No.135 of 2016** (unreported) held at Page 25 of its judgment as follows:

*“As what is challenged in this appeal regarding sentence is essentially the exercise of discretion, as a principle this Court will normally not interfere with exercise of discretion by the court appealed from unless it is demonstrated that the court acted on wrong principle, ignored material factors; took into account irrelevant considerations; or on the whole that the sentence is manifestly excessive. In **Bernard Kimani Gacheru v Republic, Cr App No. 188 of 2000** this Court stated thus:*

*“It is now settled law, following several authorities by this Court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal, the appellate court will not easily interfere with the sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account, some wrong material, or acted on a wrong principle. Even if, the Appellate Court feels that the sentence is heavy and that the Appellate Court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already stated is shown to exist. (See also **Wanjema v. Republic [1971] E.A.493.**”*

6. The offence of defilement contrary to section 8(1) as read with section 8(2) of the Sexual Offences Act No. 3 of 2006 attracts a maximum mandatory sentence of life imprisonment. The Court of Appeal has in several cases considered the constitutionality of mandatory minimum sentences under the Act; *BW v Republic KSM CA Criminal Appeal No. 313 of 2010 [2019] eKLR*, *Christopher Ochieng v Republic KSM CA Criminal Appeal No. 202 of 2011 [2018] eKLR*. In *Jared Koita Injiri v Republic*, KSM CA Criminal Appeal No. 93 of 2014 the court adopted what the Supreme Court held in *Francis Karioko Muruatetu & another v Republic SC Petition No. 16 of 2015 [2017]eKLR* that the mandatory death sentence prescribed for the offence of murder by section 204 of the *Penal Code* was unconstitutional; as the mandatory nature deprives courts of their legitimate jurisdiction to exercise discretion not to impose the death sentence in an appropriate case; and that a mandatory sentence fails to conform to the tenets of fair trial that accrue to the accused person under Article 25 of the Constitution.

7. Since the mandatory minimum sentence has been declared unconstitutional, I am bound to re-examine the sentence having regard to the fact that the legislature had taken the view the offences under the Sexual Offences Act are serious offences that merit stiff sentences and there has to be a good reason to depart from the indicative sentence prescribed by the legislature. In *Dismas Wafula Kilwake v Republic [2018] eKLR*, the Court of Appeal set out the factors to be considered in sentencing under the Act. It observed as follows:

[W]e hold that the provisions of section 8 of the Sexual Offences Act must be interpreted so as not to take away the discretion of the court in sentencing. Those provisions are indicative of the seriousness with which the Legislature and the society take the offence of defilement. In appropriate cases therefore, the court, freely exercising its discretion in sentencing, should be able to impose any of the sentences prescribed, if the circumstances of the case so demand. On the other hand, the court cannot be constrained by section 8 to impose the provided sentences if the circumstances do not demand it. The argument that mandatory sentences are justified because sometimes courts impose unreasonable or lenient sentences which do not deter commission of the particular offences is not convincing, granted the express right of appeal or revision available in the event of arbitrary or unreasonable exercise of discretion in sentencing.

8. The Sentencing Policy Guidelines require the court, in sentencing an offender to a custodial sentence to take into account both aggravating and mitigating factors. The aggravating factors include use of a weapon to frighten or injure the victim, use of violence, the number of victims involved in the offence, the physical and psychological effect of the offence on the victim, whether the offence was committed by an individual or a gang, and the previous convictions of the offender. Among the mitigating factors are provocation, offer of restitution, the age of the offender, the level of harm or damage inflicted, the role played by the offender in the commission of the offence and whether the offender is remorseful.

9. Section 354 of the *Criminal Procedure Code (Chapter 75 of the Laws of Kenya)* provides for the powers of this court upon hearing an appeal if it considers that there is no sufficient ground for interfering, to dismiss the appeal or it may, under subsection 3(b), “in an appeal against sentence, increase or reduce the sentence or alter the nature of the sentence”.

10. The law recognizes the seriousness of the act of defilement. The psychological effect of the offence on the 8-year-old victim cannot be underestimated. The Appellant pleaded guilty to the charge. He is a first offender and has shown remorse for his actions.

11. From the foregoing, I am persuaded to interfere with the life sentence imposed on the Appellant. The sentence of life imprisonment is substituted with a sentence of 15 years. The sentence will run from the date of conviction which is **09th October, 2018**.

DELIVERED AND SIGNED AT BUNGOMA THIS 09th DAY ON August 2019

T. W. CHERERE

JUDGE

In the presence of-

Court Assistant - Brendah

Appellant -Present in person

For the State - Mr. Akello